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File No. O Inam/41

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Legal **DEPARTMENT**

A **BRANCH**

Subject:— P 20 E

Opinions regarding granting of Inams and Jhagirs

File No. O Inams./41

140-A

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Government defended this suit on the ground that the inam in this case was Devasthan Inam. Government's view was based on the degree passed by the Assistant Commissioner which was framed in such terms as to suggest that conclusion. But it now appears that there was an appeal to the Inam Commissioner, and the order passed therein makes it clear beyond doubt that the inam was personal. This decision of the Inam Commissioner was not brought to the notice of Government when the defence of the suit was being considered. During the pendency of the suit the plaintiff had applied for a compromise, and, on the advice of the Remembrancer of Legal Affairs, Government decided that it would be best to leave to the decision of theCourt the question whether the inam was a personal inam, and in the light of the inam Commissioner's decree that view is correct. There is no objection, therefore to grant the request made in the present petition. But in view of the likelihood that defendant 2 may appeal against the decision of the First Clause Sub-Judge, action may be taken only after the period of appeal is over if no appeal is filed, or after the decision of the appeal, if one is filled by defendant. 2.

Remembrancer of Legal Affairs.

U.R. to R.D. No. 1594, dated the 20th February 1941.

S-C.
24th April 1956.

The village of Avhane Budruk in Shevgaon Taluka, district Ahmadnagar is held in the following xx shares:-

(1) Vighnehar Trimbak ...½ share

(2) Shankar Ramchandra .. ¼ the share

(3) Mathurabai widow of Balwantrao .... ¼ Share.

Summary settlement under Bombay Act II of 1863 has been applied to the said inam village and a sanad in Form 19(Form No. XI in Phadnis Watan Act) was issued to the ancestors of Vighnahar, Shankar and Balvantro, the deceased husband of Mathanabai The sanad dated 1st December 1866 contains the conditions subject to which the grant was made. Condition No.1 is to the following effect:- "That the said holders shall continue faithful subjects of the British Government and shall pay to the sa a fixed annual sum of Rs. 80-14-0 as Nazarana in addition to the judi or other tax heretobefore payable. " The sanad also provides that "in consideration of th fulfilment of which conditions the said village of Avhane Budruk shall be continued for ever and without objection or question on the part of Government as to the rights of any lawful holders thereof, whether such rights shall have accrued by inheritance, adoption assignment or otherwise".

In the year 1894 the father of Vighnahar borrowed a certain sum of money from Keshava Patwardhan on the mortagage of his four annas share inthe personel inam village of Avhane. Keshava Patwardha obtained a mortage decree and in the execution proceedings got possession of the

½th share of the mortgagor in the village in 1906. Similarly in the year 1897 Balwantrao, the husband of Mathurabai borrowed a certain amount from Keshava Patwardhan on the mortgage of his eightannas share in the village. Keshava Patwardhan obtained also a decree in enforcement ofhis claim onthe mortgage bond and in the execution proceedings got possession of the mortgagor's half share in the village in 1906 and enjoyed it till his death and after his death his son Hari Keshav was entered as mortgagee in possession. Hari Keshav died in 1924 and thereafter his son Purushottem Hari Patwardhan being the manager of the joint Hindu family his name was entered as morggagee in possession and as such he began to enjoy the income of 12 annas share inthe inam village of Avhane.

Purushottam Hari Patwardhan took part in the civil disobedience movement and was convicted and sentenced on 8-4-1932 under section 145 of the Indian Penal Code, section 17(1) of the Criminal Law Amendment Act and also under section 18(1) of the Indian Press Emergency Powers Act, 1931. The question that then arose was whether the 12 annas share in the village of Avhane held by Purushottam Hari Patwardhan as morggagee with possession could be resumed by Government on the ground of breach of the loyalty clause in the sanad. The R.L.A. who was consulted opined that although the point was not free from doubt the morggagee in possession of an inam settled under Bombay Act II of 1863 should be deemed to be holder and for the act of disloyalty on the part of said mortgagee, the three-

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fourths share which was held by him could be resumed by the levy of full assessment (see R.L.A.'s and opinion No. Confl. 73 dated 7-4-1933). Government accepted the opinion of the A.L.A. and resumed the three fourths share of the inam village of Avhane (see G.R.R.D.No. 40/33 Confl. dated 6-10-1933). Then, Vighnahar and Mathurabai filed a civil suit No. 3 of 1935 inthe First Class Sub-Judge's Court Ahmednagar against Government for a declaration that the order of resumption passed by Government was illegal since, the mortgagee being not a holder, there was no breach of condition No. 1 of the sanad. Government sanctioned the defence of the suit on the lines of the R.L.A.'s opinion No. Confl. 73 dated 7-4-1933 and the First Class Sub-Judge, Ahmadnagar, accepted the contention of Government and dismissed the suit, holding that the mortgagee was the holder of the inam village. Vighnahar and Mathurabai filed an appeal (First Appeal No. 277 of 1937) to the High Court. When the appeal was pending Vighnahar and Mathurabai requested Government to restore the ¾ th share of the inam village standing in the name of Purushottam Hari Patwardhan. By. G.R. (R.D.) No. 40/33 dated the 3rd March 1938 Government cancelled the G.R. No. 40/33 confl. dated 6-10-1933 and restored the ¾ th share in the inam village to Purushottam Hari Patwardhan as mortgagee in possession and the appeal pending the High Court was withdrawn by Vighnahar and Mathurabai.

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Purushottam Hari Patwardhan has again taken part in the anti-Government activities and he has been convicted and sentenced by the Sub-Divisional Magistrate Satara, on 20th August 1940 to one year's rigorous imprisonment and a fine of Rs 100 in default to two months' rigorous imprisonment under rule 38(5) for contravening the provisions of rule 38(1)(a) read with rule 34(6)(g) and (k) of the Defence of India Rules. The question for consideration is whether the ½ the share in the inam village of Avhane held by Purushottam Hari Patwardhan as mortgagee can be resumed for breach of the loyalty clause of the sanad.

It is clear from the facts stated above that the question raised now is the same that was considered by the R.L.A. in his opinion No. 73 Confl. dated 7-4-1933. In that opinion the R.L.A. (Mr. Davis) considered the R.L.A.'s previous opinions No. 1606, dated the 21st August 1922 and No. C-inam 2/30, dated the 23rd December 1930. In his opinion No. 1606 dated the 21st August 1922 the R.L.A. (Mr. Wild) stated "If the inam is resumed, the Inamdar would be the loser to the extent to which the value of the inam exceeds the amount due from him to the mortgagee in possession court would be slow to hold that one person's property could be resumed for the fault of another and could be alert to find reasons for avoiding such conclusion. The definition of "holder" in section 16 of the Bombay Act II of 1863 ~~includes~~ includes a mortgagee in possession and the definition is for the purposes of the Act. A settlement under the

Act is a purpose of the Act though no fo: is prescribed. But in the circumstances it would probably be held that the subjec matter of the clause requiring a loyalty on the part of the holder precluded the wider signification of the term holder" This opinion of the R.L.A. (Mr.Wild) was approved and followed by the R.L.A. (Mr. Wanavabig in his opinion No.2/30 dated 23: December 1930. After considering these opinions the R.L.A. (Mr. Davis) in his opinion No.73-Confl. dated 7-4-1933 stated "In the case of ~~an~~ a personal inam subjected to a summary settlement, such as the inam now under consideration the land after the settlement ~~xxxxxxx~~becomes the free hold property of the holder and is transferable without any limitation or restriction. By the terms of the sanad granted in the case Government expressly ~~x~~ agree to recognise the rights of any person, whether such right may arise by inheritance, adoption, assignment or otherwise". In the case of such an ~~x~~ inam every personwho acquires such right becomes a holder. If therefore inam is partitioned either by inheritance or ~~xxxxx~~alienation each one of the sharers will become a separately to abide by the conditions of th grant. In the present case it appears from the Collector's report that the inam village has been divided in three shares of 1/4 and 3 and two of these ~~xx~~ shares ~~are 1, 2 and 3~~ forming 3/4 of the village is in possession of the mortgagee, who has been found disloyal. The ablve shares have been seperately registered in the annewari

i.e. the revenue records. The resumption by levy of full assessment will therefore be made in respect of the 3/4 share in possession of the mortgagee. The conclusion therefore is :-

(1) that although the point is not free from doubt, the mortgagee in possession of an inam settled under the Bombay Act II of 1863 should be deemed to be a holder.

(2) for the act of disloyalty on the part of the said mortgagee, the three-fourths share which is at held by him should be resumed by the levy of full assessment."

Although the First Class Sub-Judge, Ahmadnagar held that the resumption was valid, the point does not seem to be still free from doubt. There is no authoritative decision of the High Court on the question whether a mortgagee of the whole or any part of a personel inam village settled under Bombay Act II of 1863 is a holder". The reasoning of Mr. Davis does not appear to be quite convincing. Itis true that a person to whom the whole or part of such personal inam village has been alienated or who gets it by inheritance is a holder because such person holds such village or a part thereof as the case may be, as full owner thereof. But the same cannot be said of a mortgagee with possession of such village or part thereof. Such mortgagee holds a limited interest, the equity of redemption being still in the mortgagor. If the inam in possession of a mortgagee is resumed for his disloyal act, the mortgagor in whom the equity of redemption still

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vests would be deemed to have been penalis
ed for the misdeed of his mortgagor. The
view taken by Mr.Wild appears to be more
reasonable. However the point is not free
from doubt. If the 3/4 the share in the
inam village is resumed in the present
case, the matter is sure to be taken again
to the civil court and it is doubtful
what view the High Court will take. In
these circumstances it is for the admini-
strative department to decide whether it
is expedient to take a risk of litigation.

Personally I agree with the view
taken by Messers Wild and Nanavati.
Please however see Mr. Rajadyaksha's note
dated 18-12 and then H.M. (H & LA)'s
note dated 8-1-38 at 60-61 at R D. file
40/33 II . Both of them were of the
opinions that there was a reasonable
chance of Govt. succeeding in the appeal
thus pending in the High Court.

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Although the question is not entirely free from doubt, I am inclined to agree with the R.L.A.'s (Mr. Davis) opinion of 8-6-1933. The inam is a personal grant, heritable and transferable. Under the terms of the Sanad the village is to be continued for ever without increase of land tax and without objection or question on the part of Govt. as to the rights of any lawful owners thereof, whether such rights shall have accrued by inheritance, adoption, assignment or otherwise. The term "lawful holders" would seem to include all persons entitled to hold the land such as heirs, assignees and mortgagees in possession. If the holder is guilty of disloyalty, his share of the inam is liable to be resumed by Government.

As, however, the question is of considerable importance and the opinions of the previous R.L.A.s are in conflict, these papers may be sent to the Advocate General for favour of his opinion and he may be requested to return them at his early convenience.

D.R. to the Advocate General, Bombay no. 142-Confl. dated 20-3-41.

4th April 1936.

The Sanad imposes the obligation mentioned in the condition No. 1 on the holder and provides that in consideration of the fulfilment inter alia of that condition the village shall be continued for ever and without objection or question on the part of the Government as to the rights of any lawful holders thereof. It is, therefore, clear that the Government will be entitled to resume if there is a breach of this condition by any lawful holder. This being inam land, the resumption can only be made by the levy of full assessment.

2. The facts stated make it clear that this condition has been broken by the mortgagee. The answer to the question whether such a breach by the mortgagee who is a xxxx mortgagee in possession will entitle ~~xxxx entitle~~ Government to resume must depend on whether the mortgagee can be regarded as a lawful holder within the meaning of those words as used in the Sanad.

3. The definition of the word "holder" in section 16(F) of act II of 1863 includes a mortgagee in possession. This however is an artificial definition enacted for the purposes of the Act as is stated in the sub section itself. Having regard to the provisions of the Act which contain obligations to pay certain charges, it stands to reason that the definition of "holder" should include a mortgagee in possession.

4. I do not think however that in constructing the words "lawful holders thereof" the definition of the word "holder" contained in the Act will apply. The words which follow, viz. "whether such rights shall have accrued by inheritance, adoption, assignment or otherwise " point to persons who have acquired complete right in the village or portions of it rather than to persons who have limited interests in the village or portions thereof. The word assignment in the Sanad seems to refer having regard to the words which precede it to an assignment of the whole interest of the holder and not to an assignment merely by way of security as for a debt due.

S.C.
24th April 1958.

The words "or otherwise" at the end of the clause will have to be construed ejusdem generis with the preceding words and will not, therefore, include an assignee by way of mortgagee; It must be remembered that the mortgagee is merely a crediter to whom certain shares in the village have been given as security for a debt x due to him. I am, therefore, inclined to the view that notwithstanding the definition in the Act, the mortgagee will not be a lawful holder within ghe meaning of the Janad.

5. It may be stated however that the matter is not free from doubt.

6. The resumption will undoubtedly lead to litigation and the Courts will be loth to adopt a construction which would result in depriving the mortgagor of his interest in the village for a breach of the condition of the grant by a mortgagee, particularly as the condition is entirely of a personal nature the performance of which the mortgagor can not be procured by the mortgagee.

Advocate General
23-3.41

U.R. to R.D. No. 2359 dated 31-3-1941.

C.C.
24th April 1956.

In Civil Appeal No. 159 of 1930 the High Court has held that on the wording of the two sanads issued in the present case x no ~~a~~ trust could be said to have been created. The sanads are binding on the parties and it would not be legally possible for Government to contend that the properties covered by these sanads are trust properties. Even assuming a mistake was made in issuing the sanads in the form in which they were issued, such mistake being unilateral it would x not now be open to Government to vary their terms particularly in vi view of the fact that the said terms have been acted upon for such a long period. The Government Resolution No. 853, dated the 1st March 1869 is in no way inconsistent with the decision of the High Court but the Government Resolution No. 8374, dated the 3rd December 1883 which was issued as explanatory to the Government Resolution of 1869 states that these properties are trust properties. Evidently therefore the Government Resolutio of 1869 is inconsistent with the High Court decision. Where pa ties have entered into a formal contract, that contract must be construed according to its own terms and cannot bt explained or interpreted by the antecedent communings which led up to it. (Per Viscount Dunedin In Bomanji vs. Secretary of State, 31 Bom. L.R. 256 at pà 259). As stated before as the sanads have been issued and acted upon as far back as since 1888, the tenure of the lands must be determined by reference to the terms of the sanads and the two Government Resolutions cannot be used for this purpose. Consequently there is no legal objections to cancelling the Government Resolution of 1883 as p proposed by the Commissioner in paragraph 5 of his letter at page 51 ante.

Remembrancer of legal affairs.

U.R. to R.D. No. 11 confl. dated the 7th January 1941.

Office of the R.L.A.

In this case, Lands were granted for performance of service of Kazi and Khatib, but in the Sanads issued the land granted for Kazi service were wrongly shown as having been granted for Khatib service.and vice versa. There appears to be no doubt as to the intention underlying the grant and the error has obviously crept in through inadvertance in transcribing the Sanads. Consequently, if the grantees consent in writing there is no objection to amending the sanads for the purpose of carrying out the true intention of the parties at the time they were issued.

Remembrancer of legal Affairs.

U.O. to R.D. No. 5616, dated the 20th June 1941.

S.C.
24th April 1956.

Both the Marathi version and the English version of the Sanad granted to Mr. Manoel RR D'Souza have been signed by Mr. George Flinks Pitt and bear the same date. Consequently so far as possible they should be so read as to avoid any conflict between them. In the English xxxxxxx version of the sanad, the words used are "you, your heirs are to enjoy the same in perpetuity." These words do not limit sucession to the male heirs in male descent of Manoel D'Souza. In the Marathi version of the sanad, the words used are " तुम्ही व तुमचे वारसानी वारसाहकाने चालवणे पुत्रपौत्रादी वंशपरंपरा अनुभवणे पुरुषपरंपरा उपभोगावा The words पुत्रपौत्रादी वंशपरंपरा have been the subject of judicial interpretation by the xxxxxxx Courts by the various High Courts and have been consideredby the R.L.A. andthe Advocate General on many occasions (see R.L.A.'s op inion No.M360 , dated 18th December 1899, No. 153-M, dated 9th April 1903, No. 969, dated 23rd December 1922 and R.L.A.'s No. 5306, dated 23rd Decemb 1936). Even though the literal meaning of the words " वंशपरंपरा be "from generation to generation in the male line", the words have by usage acquired the wider meaning importing a heritable grant both in the male and the female line (see 4 Bom. H.Ct. Rep. (A.C.J.). As stated by the Advocate General in his opinion dated 23rd December 1932, it is too late in the day to attempt to construe these words in the restricted sense that the estate is heritable only in the male line of the grantee.

2. In view of what is stated above, it does not appear necessary to consult the Advocate General again.

Remembrancer of Legal Affairs.

U.R. to R.D., No. 6025, dated the 11th July 1941.

R.I.No.9477
7-10-1941.

Submitted,

Attention is invited to R.L.A.'s opinion No. 6025, dated 11-7-1941 in which the R.L.A. had advised that the words पुत्रपौत्रादि वंशपरंपरा etc. occuring in the sanad granted to Mr. Manoel D'Souza in the year 1835 did not limit the succession of the estate to the male heirs in male descent only. In a series of opinions from 1895 onwards the R.L.A. has held the view that the words "putrapoutradi vanshaparampara" convey an absolute, alienable and irresumable estate. That expression has also been the subject matter of a number of judicial decisions and the principle has been clearly laid down that the words convey an absolute estate unless in a particular case some custom were proved which would exclude the ordinary law Govt. has not accepted this interpretation of the expression. In 1936, the Commr. C.D. observed that the doctrine that sanads containing these words convey an absolute estate was "an altoghther revolutionary one" and he deprecated the final acceptence of that view by Govt without further consideration. As in his recent opinion dated 11-7-41, the R.L.A. has upheld the view expressed so far the Commr. C.D was again consulted by the R.D. the Commr. agrees so far as the grant of the request of Mr. D'Souza in this particular case is concerned; without however Govt.

generally accepting the opinion of the R.L.A. It seems that R.D. is not still inclined to accept the view expressed by the R.L.A, so far; butpresumably R.L.A. is requested to consider the points discussed by the Commr. C.D. in his u.o.r. dated 17th Septemb 1941 at p.9 ante. The reference involves the reconsideration of the view expressed by the R.L.A. in his opinion NO.6025 dated 11-7-1941.

2. The Commr. C.D. in his u.o.r. at p.9 ante has referred to the various opinions of the R.L.A. and the decision of the High Court to the effect that the words "putrapautradi etc." convey an absolute inheritable estate. The Commr. however relies upon R.L.A.'s opinion No. 955 dated 9-8-1882 in which the R L.A. had observed that the proper rendering of the words "putrapautradi vanshparampara" was "sons and son's sons from generation to generation". This appears to be the only opinion of the R .L.A. interpreting these words as excluding descent to females. In a series of opinions from 1895, the R.L.A has however expressed a view to the contrary; and in view of that fact it appears doubtful whether reliance can be placed on the old opinion of 1882. In Ramlal Mookerjee vs. Secretary of State I.L.R.7 Cal. 305, a decision given in 1881, their Lordships of the Privy Council have observed at p.315 that they saw "nosufficient reason for narrowing the construction of words which have been often recognized in India and by the P.C. as apt for conferring an estate of inheritance". After the R.L.A. expressed his opinion in 1882, the words in question have also been considered on several occasions by the various High Courts in India. In Ramsaran Lall

vs. Ram Narayan Singh, I.L.R.42 Cal. 305 the Calcutta High Court has observed that th words "Putrapoutradi" must be construed in the first place according to any construction that has been legally recognized. It was further held that the decision in 7 Cal.305, above referred to, that the word passed an absolute estate of inheritance could not be treated as obiter. Secondly, the general rule laid down by the P.C. can be modified only if a custom to the contrary is setup and proved. The Commr. C.D. remarks in para 3 of his note at p.10 ante that even while holding in Krishnarao Ganesh vs.Rangrao (4BH. C.R. A,C.J.I.) that the term does not restrict inheritance to male heirs the High Court has admitted that the literal meaning of the words is "from generation to generation in male line". As laid down in 42 Cal. however reliance can not be placed on the literal meaning of the words The judicial interpretation of the words alone will have to be taken into consideration.

3. In Chandmal vs. Vishvanath, 24 Bo L.R.300 it has been held that the words " " when appearing in a will, convey an absolute estate of inheritance, alienable and never resumab unless in a particular case some custom be proved which will exclude the ordinary law. There is no difference whether such words be found in a will or lease. In Mir Safdar Ali vs. Mirza Maksudali Beg. 32 Bom.L.R. 484, where an inam grant was continued to the claimant and

nis "lineal descendants in perpetuity" the P.C. has held that the expression "lineal descendats" included descendants in the female line. The view expressed by the Commr. C.D. in para 3 of his note does not thus appear to be correct; and there is no cas to modify the view taken by the R.L.A. so far.

The attention of R.D. may be invited to the interpretation of the expression "putro poutradi" or putra-pautradi" in Wilson's Glossary at p 686 & that dept may be informed that the R.L.A.does not see any reason to modify the view taken by him

The papers may be returned under the followung remarks:-
Seen and returned
The R.L.A. sees no reason to modify
~~xxx xxxx xxxpxxx~~ his premiars

U.R. to R.D. No. 9647 dated 8-11-1941.

S.C.
24th April 1956.

Office of the R.L. A.

Prima facie the future distribution of the Revenue in proportion to the share held by each share holder appears to be free from objection; But in the absence of proper date the R.L.A. hesitates to expfess any op inion particularly on the legality of the proposal to make adjustments in respect of past payments from future payments. In the circumstances it would be advisable forR.D. to request the Collector to ascertain from all the shareholders xxxxx whether they have any objection to (1) the revenue being distributed in future in proportion to the share of each shareholder and (2) adjustments in respect of past payments being made from future payments The shafeholders are hardly likely to agree to the second proposal but is possible that their replies might throw some light on the correctness or incorrectness of the past payments.

Remembrancer of legal Affairs.

U.R. to R.D. No. 11039 , dated the 22nd December 1941.

S.C.

24th April 1956.